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No. 87-_____

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

ANTHONY J. DECINTIO,

Petitioner,

v.

WESTCHESTER COUNTY MEDICAL CENTER;
COUNTY OF WESTCHESTER,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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QUESTIONS PRESENTED

1. Does an individual who invokes local administrative procedures mandated by Title VII forego his rights under other federal statutes and the Constitution?

2. Is a claimant precluded from exercising his rights in federal court under the Reconstruction Civil Rights Acts when a state fair employment agency dismisses his charge without the benefit of discovery and without providing an adversarial hearing?

PARTIES IN THE COURT BELOW

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NO. 87-____

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1987

ANTHONY J. DeCINTIO,

Petitioner,

v.

WESTCHESTER COUNTY MEDICAL CENTER;
COUNTY OF WESTCHESTER,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

The petitioner, Anthony J.DeCintio, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Second Circuit entered in this proceeding on June 8, 1987.

CITATIONS TO OPINIONS BELOW

The opinion of the court of appeals is reported at 821 F.2d 111 and is set out in the appendix to this petition at pages 1a-42a.[1] The judgment of the district court and the ruling granting respondent's motion to dismiss is unreported and is set out in the appendix at pages 43a-47a. The appendix (48a-53a) also includes the determination by the New York State Division of Human Rights.

JURISDICTION

The judgment of the court of appeals affirming the district court's dismissal of all non-Title VII claims was entered on June 8, 1987. On August 26, 1987, Justice Marshall entered an order extending the time for filing a petition for writ of certiorari to and including

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[1] The Second Circuit issues no separate judgment after the opinion.

October 6, 1987. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

STATUTES INVOLVED

This case involves 42 U.S.C. §§ 1981 and 1983. Section 1981 provides:

> All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

(R.S. § 1977)

Section 1983 provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by

> the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

STATEMENT OF THE CASE

1. Proceedings Below

The petitioner, Anthony J. DeCintio, brought this action on December 6, 1985, in the United States District Court for the Southern District of New York against his former employer, the Westchester County Medical Center, and the County of Westchester. The action was brought under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e et seq., 42 U.S.C. §§ 1981 and 1983, the Fair Labor Standards Act, 29 U.S.C. § 215(a)(3), and the Fourteenth Amendment to the United States Constitution and alleged that the respondents had retaliated against Mr.

DeCintio because he had filed discrimination charges against them. The Medical Center and the County moved to dismiss under Rule 12(b)(1) and (6) of the Federal Rules of Civil Procedure or, in the alternative, for summary judgment under Rule 56. By memorandum endorsement filed March 5, 1986, the district court granted the motion, and judgment was entered March 6, 1986.

The petitioner appealed to the United States Court of Appeals for the Second Circuit which, relying on University of Tennessee v. Elliott, ____ U.S. ____, 106 S. Ct. 3220 (1986), reversed with respect to Title VII claims but affirmed with respect to § 1981, § 1983, the Fair Labor Standards Act and the Fourteenth Amendment. The court of appeals held that rules of preclusion applied to the determinations of the New

York State Division of Human Rights. Since the Division had made a finding of "no probable cause," the court held that Mr. DeCintio was "precluded from relitigating the retaliatory discrimination issue in a federal action." Appendix at 29a.

2. Statement of Facts[2]

Anthony J. DeCintio was employed as a staff respiratory therapist in the Respiratory Therapy Department of the Westchester County Medical Center, which is operated by the County of Westchester, from May 12, 1980 until February 7, 1985. In April, 1982, the job of Assistant Chief Respiratory Therapist was created in the Respiratory Therapy Department,

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[2] The district court did not conduct a trial or make findings of fact. The facts herein are taken from the submissions to the court. Since the action was dismissed summarily by the district court, the allegations of the petitioner must be taken as true.

and assigned to the Neonatal Unit. A new "special requirement" of registration by the National Board of Respiratory Therapy was added to this position. Neither DeCintio nor any of the other staff respiratory therapists, most of whom were male, was so registered. A woman, alleged to be the girlfriend of the Chief Respiratory Therapist and who met this "requirement," was hired for the position before the posting period required by the applicable collective bargaining agreement had expired.

Based upon these events, DeCintio, on behalf of himself and others similarly situated, filed a charge of sex discrimination with the Equal Employment Opportunity Commission against the Medical Center and the County on May 17, 1982, asserting, in essence, that the "special requirement" of registration was

concocted to enable the Chief Respiratory Therapist to hire his alleged girlfriend rather than one of plaintiffs. DeCintio filed similar charges with the New York State Division of Human Rights on June 3, 1982. Thereafter, on or about August 6, 1984, DeCintio and six other male staff respiratory therapists filed a complaint in the United States District Court for the Southern District of New York based upon the same facts ("DeCintio I")(id.). After a trial on the merits, Judge Charles L. Brieant found that DeCintio and the other males had been unlawfully discriminated against by the Medical Center and County in violation of Title VII, 42 U.S.C. § 2000e et seq., and the Equal Pay Act, 29 U.S.C. § 206(d) (DeCintio et al. v. Westchester County Medical Center, 84 Civ. 5566 (S.D.N.Y., June 10, 1986)).

The complaint in the instant action ("DeCintio II") alleges that after DeCintio filed his charges of sex discrimination, respondents began to harass him and ultimately, in February, 1985, suspended him without pay. Respondents' stated reason for the suspension was based upon two incidents of alleged misconduct and incompetence. DeCintio contends that either his actions in both situations were in accordance with Medical Center policy or that he had acted in the same manner as other employees who were not disciplined.

A hearing was held pursuant to § 75 of the New York State Civil Service Law and concluded May 14, 1985. The hearing officer, who was selected and compensated by the defendant County, found DeCintio guilty of all charges, and on June 26, 1985, DeCintio was discharged.

On November 9, 1984, Mr. DeCintio filed a verified complaint with the New York State Division of Human Rights ("SDHR") charging the respondents with retaliation. SDHR is a "certified 706 agency" and is authorized to accept complaints on behalf of the Equal Employment Opportunity Commission ("EEOC").[3] On February 19, 1985, the

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[3] Section 706(c) of Title VII provides that where a qualifying state or local agency exists, "no charge may be filed ... by the person aggrieved ... before the expiration of sixty days after state proceedings have been commenced ... unless such proceedings have been earlier terminated." To qualify as a "706 agency the state must have a fair employment law which proscribes employment practices based upon race, color religion, sex or national origin and the local agency must have authority to remedy the violation. 29 C.F.R. § 1601.70(a). The agency becomes certified if (1) it has been a 706 agency for four years; (2) the agency's work product has been evaluated favorably within the previous twelve months; and (3) the agency's findings under EEOC worksharing contracts have been accepted in at least 95% of cases in those twelve months. 29 C.F.R. § 1601.75(b).

County and Medical Center, through their attorney, sent a letter response to a Request for Information from SDHR in which they generally denied any harassment or retaliatory conduct. On July 13, 1985, Mr. DeCintio filed another complaint with SDHR charging retaliation, specifically citing his suspension. On July 22, 1985, the county's attorney sent another letter to SDHR, denying any harassment or retaliation and summarizing the results of the § 75 hearing.

On August 30, 1985, SDHR wrote Mr. DeCintio, informing him that if he did not respond by September 11, 1985, a decision would be made based on the information in the file. In response Mr. DeCintio submitted an affidavit with three exhibits to SDHR. This affidavit described the events and actions for which he was suspended and discharged and

stated, inter alia, that:

1) Although one of the incidents in question occurred on May 23, 1984, he was not disciplined until it was raised as a reason for his suspension on February 7, 1985;

2) He had acted in accord with Medical Center policy;

3) Medical Center administrators had expressed overt animus toward him and had accused him of being the "ringleader" of the complainants in DeCintio I.

Mr. DeCintio also submitted an affidavit from a former Chief Respiratory Therapist stating that Mr. DeCintio had acted in accord with Medical Center policy and should not have been disciplined.

No further submissions were made by the County and Medical Center before SDHR. On November 27, 1985 SDHR summarily dismissed both complaints filed by Mr. DeCintio. There was no adversarial hearing or even a confrontational meeting conducted by the division. No affidavits or other sworn statements were

submitted by respondents.

REASONS FOR GRANTING THE WRIT

This case presents important issues concerning the access to federal courts of individuals who avail themselves of the statutory mechanisms set up by Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e et seq. In establishing the remedial scheme under Title VII, Congress stressed that it was not designed to affect rights under other statutes. By granting preclusive effect to findings by local deferral agencies the court below has done precisely what Congress said should not be done. As the discussion which follows demonstrates, giving preclusive effect to the determinations of mandatory deferral agencies forces complainant to make an election of remedies between Title VII and other federal statutes, contrary to

congressional intent.

I. THE DECISION BELOW CONFLICTS WITH DECISIONS OF THIS COURT CONCERNING THE INDEPENDENT RELATIONSHIP BETWEEN TITLE VII AND THE RECONSTRUCTION CIVIL RIGHTS ACTS.

In Johnson v. Railway Express, 421 U.S. 454 (1975) this Court held that Title VII and 42 U.S.C. Section 1981 were "separate, distinct, and independent." Id. at 461. Relying on the legislative history of Title VII, this Court held that a pending EEOC claim would have no proscriptive effect on a claim under 1981:

> We are disinclined, in the face of congressional emphasis upon the existence and independence of the two remedies, to infer any positive preference for one over the other, without a more definite expression in the legislation Congress has enacted, as, for example, a proscription of a § 1981 action while an EEOC claim is pending.

Id. Thus the Court reaffirmed its position in Alexander v. Gardner Denver, 415 U.S. 36, 48 (1974), stating that

"Title VII manifests a congressional intent to allow an individual to pursue independently his rights under both Title VII and other applicable state and federal statutes."[4] Rather than honoring the "independence of the[se] avenues of relief," the decision below would force an aggrieved individual to choose between the two statutory schemes. Although the decision below addresses only the

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[4] Congress noted that "the remedies available to the individual under Title VII are co-extensive with the individual's right to sue under ... § 1981 ... and that the two procedures augment each other and are not mutually exclusive." H.R. Rep. No. 92-238, 92nd Cong., 1st Sess. 19 (1971). See also S. Rep. No. 92-415, p. 24 (Title VII would not "affect existing rights granted under other laws.") and 118 Cong. Rec. 3371-3373 (1972) (Senate rejection of amendment which would have prevented claimant from suing under § 1981); See also Burnett v. Grattan, 468 U.S. 42, 49 (1984) (Reconstruction-era Civil Rights Acts independent of other federal statutes); Jones v. Alfred H. Mayer Co., 392 U.S. 409, 416-417 (1968) (Title VIII of 1968 Civil Rights Act "had no effect upon § 1982).

preclusion issue, the practical effect of the ruling will either force individuals to choose between Title VII and non-Title VII statutes or so undermine the Title VII procedural scheme that Congressional intent would be defeated.

Under Title VII, Congress sought to encourage full use of state remedies. However, if the decision below is allowed to stand, aggrieved individuals would frequently choose to avoid or abandon state proceedings in order to escape the possibility of precluding their access to federal court on non-Title VII claims. The net effect of these uncertainties would most likely be an increased caseload for the federal court system.[5]

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[5] Persons seeking advice about complaints of discrimination are routinely advised to file charges with the appropriate state or local deferral agency. If a "no probable cause" finding without the benefit of a hearing will foreclose some federal claims, full

Since resort to state and local proceedings is mandatory under Title VII,[6] the claimant would have to forego such proceedings and go directly to federal court or request that the agency abandon its processing prior to an adverse determination.

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resort to the administrative mechanism would be ill-advised. In the New York State Division of Human Rights, for example, for 1985-86, 6705 complaints based on employment discrimination were resolved. Annual Report, New York State Division of Human Rights, 1985-1986. Without the benefit of a hearing, 4269 (63.7%) of these charges resulted in findings of "no probable cause." Of the 233 cases scheduled for a hearing, only 78 actually went to hearing and probable cause was found in 25 of those cases. Thus probable cause was found in less than 0.4% of the cases resolved. These statistics take on compelling significance if a finding of no probable cause means preclusion of a claim.

[6] Of course in non-deferral states, the claimant files directly with the EEOC. Since decisions by the EEOC are not given preclusive effect, the ruling of the lower court would create the anomalous situation of giving claimants more protection for their non-Title VII federal claims in such states.

Finally, the ruling by the lower court is logically inconsistent with the statutory scheme of Title VII. The "congressional directive that the EEOC should give 'substantial weight' to findings made in state proceedings" conflicts with a rule giving preclusive effect to the findings of FEP agencies because "EEOC review of discrimination charges previously rejected by state agencies would be pointless if the federal courts were bound by such agency decisions." Kremer v. Chemical Construction Co., 456 U.S. 461, 470 n.7 (1982).[7] While the findings of the state

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[7] In fact, the findings of state agencies are, in effect, the findings of the EEOC. Under its worksharing agreements with such agencies, the EEOC will automatically accept the findings of such agencies unless specifically requested by the complainant to conduct a substantial weight review of such findings. See 29 C.F.R. §§ 1601.76, 1601.77. Moreover, in order to be certified by the EEOC as a designated 706

agency would be given only "substantial weight" for Title VII purposes, the lower court would give those same findings preclusive effect for other statutory claims.

II. THE DECISION OF THE SECOND CIRCUIT CONFLICTS WITH THIS COURT'S DECISION IN UNIVERSITY OF TENNESSEE v. ELLIOTT AND DECISIONS BY OTHER COURTS OF APPEAL ON THE PROPER APPLICATION OF FEDERAL PRECLUSION PRINCIPLES.

The court below applied the doctrine of preclusion without analyzing the situation as outlined in University of Tennessee v. Elliott. Preclusion is not a rigid doctrine. Its application depends on the surrounding facts and circumstances. "Redetermination of issues is warranted if there is reason to doubt the quality, extensiveness, or

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agency, an agency's "findings and resolutions ... [must] have been accepted by the Commission in at least 95% of the cases processed by the 706 agency in the past 12 months." 29 C.F.R. § 1601.75

fairness of procedures followed in prior litigation." Montana v. United States, 440 U.S. 147, 164 n. 1 (1979) The Court in Elliott set forth certain criteria which had to be met before an agency decision would be entitled to some preclusive effect. Thus preclusion would only apply when the agency was (1) acting in a judicial capacity (2) to resolve disputed issues of fact (3) properly before it (4) which the parties have had an adequate opportunity to litigate. United States v. Utah Construction & Mining Co., 384 U.S. 394, 422 (1966). Only after these criteria have been met, should the federal court "give the agency's factfinding the same preclusive effect to which it would be entitled in the State's courts." Elliott, ____ U.S. at ____, 106 S. Ct. at 3227. The court below reached the inquiry into state law

before analyzing the threshold criteria outlined in Elliott.

a. The New York State Division of Human Rights was not acting in a judicial capacity.

The court below appears to have assumed that SDHR was "acting in a judicial capacity." While this Court did not define that phrase in Elliott, the ruling of the Second Circuit clearly conflicts with the Seventh Circuit's analysis and the general approach by courts and commentators.[8]

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[8] See e.g., 4 K. Davis, Administrative Law Treatise, § 21.3, pp. 51-52 (2d ed. 1983):

> When an agency conducts a trial type hearing, makes findings, and applies the law, the reasons for treating its decisions as res judicata are the same as the reasons for applying res judicata to a decision of a court that has used the same procedure. But the formality may be diminished in any degree, and when it is sufficiently diminished, the administrative decision may not be res judicata. The starting point in drawing the line is the observation

In Buckhalter v. Pepsi-Cola General Bottlers, Inc., 820 F.2d 892 (1987), the Seventh Circuit held that the proceedings must be comparable to a trial to sustain a finding that an agency acted in a judicial capacity:

> In view of the fact that the HRC judicial proceedings were conducted in the same manner as a trial in Illinois state court, we are convinced that the HRC was acting in a judicial capacity.

> that res judicata applies when what the agency does resembles what a trial court does. Such a resemblance or lack of it applies to determinations of law as well as to determinations of fact. [emphasis added]

See also Restatement (Second) of judgments, § 83, p. 269 (1982):

> Where an administrative forum has the essential procedural characteristics of a court ... its determinations should be accorded the same finality that is accorded the judgment of a court.

Id. at 896.[9] The court then cited one of its previous decisions in which it held that

> [T]he United States Patent Office's Trademark Trial and Appeal Board was acting in a judicial capacity because ... the parties had the benefits of "an adversary proceeding. Both parties ... were represented by attorneys before the Board; both presented evidence and submitted briefs."

Id. (emphasis added)

The determination by SDHR in this case fell far short of rising to the level of an adjudication. There was no hearing. There were no legal arguments presented, no opportunity to rebut evidence, no arguments by opposing parties. SDHR never even brought the parties together for a confrontational

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[9] The proceedings in Buckhalter were presided over by an administrative law judge who "made extensive findings of fact and conclusions of law, and applied the proper burden of proof for a claim of employment discrimination as set forth by the Supreme Court." Id.

meeting. This obviously does not qualify as "acting in a judicial capacity". To the extent that the Second Circuit would allow the rules of preclusion to apply, it conflicts with the Seventh Circuit.

b. The SDHR proceedings in this case did not afford Mr. DeCintio a full and fair opportunity to litigate his claim.

In Parklane Hosiery Co. v. Shore, 439 U.S. 322, 331 (1979), this Court noted that preclusion would be inappropriate where "the second action affords ... procedural opportunities unavailable in the first action that could readily cause a different result." In federal court, Mr. DeCintio would have been entitled to all the rights guaranteed by the Federal Rules of Civil Procedure. He could have conducted discovery. He could have presented evidence in the form of documents or live witnesses. He would have been entitled

to cross-examine witnesses presented by the defendants. The absence of these safeguards severely prejudiced his presentation. Under these circumstances, Mr. DeCintio did not have a full and fair opportunity to litigate his claims.

By allowing preclusion to agency determinations without a hearing, the Second Circuit conflicts with the Eleventh Circuit, whose rule is that there can be no full and fair opportunity where there is no hearing:[10]

> The administrative decision approved by the Supreme Court in Utah Construction, supra, was the result of a full adversary proceeding with testimony, cross-examination, exhibits, briefs, and arguments.... It follows that an agency proceeding which does not afford an opportunity to present live witnesses or to cross-examine opposing witnesses

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[10] Although the Seventh and Eleventh Circuits focus on different elements from Utah Construction, both recognize that an agency determination is inadequate in the absence of an adversary hearing.

> does not meet the test that the parties were afforded a full opportunity to litigate.

City of Pompano Beach v. Federal Aviation Administration, 774 F.2d 1529, 1538-39 n.10 (11th Cir. 1985), Accord, Delgado v. Lockheed-Georgia Co., A Division of Lockheed Corp., 815 F.2d 641, 647 (11th Cir. 1987).

In McDonnell-Douglas Corp. v. Green, 411 U.S. 792 (1973) and Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248 (1981), this Court set forth the order and burden of proof in an individual case of employment discrimination. After the complainant has made out a prima facie case and the defendant has "articulated" a reason for its action, the plaintiff must still have an opportunity to show that the proffered reason "is applied alike" to other employees. 411 U.S. at 804. In the

absence of an adversarial hearing and adequate discovery, the complainant is effectively deprived of this opportunity.[11] He will be unable to develop comparative evidence or to present statistical data on the treatment of members of the protected group.

Mr. DeCintio, for example, filed an affidavit with SDHR stating that there had been more than an eight-month gap between the occurrence of one of the incidents and the discipline he received for his actions. Mr. DeCintio had no opportunity to question the respondents about this discrepancy. Mr. DeCintio

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[11] Without the discovery tools afforded by the federal courts, the complainant would have difficulty developing the information to demonstrate that other persons are similarly situated. The complainant would be particularly prejudiced in cases involving retaliation where he must be able to place the employer's actions in the context of earlier events.

also alleged that he had acted in accord with Medical Center policy and he was supported by a second affidavit. Mr. DeCintio further alleged that other employees had acted "in the same manner" and had not been disciplined. He had no opportunity to develop this evidence.

SDHR did not even require the respondents to submit sworn statements. Mr. DeCintio was thus not afforded a full and fair opportunity to show that the profferred reason was pretextual. Since the federal court would have provided procedural safeguards not afforded Mr. DeCintio at SDHR, the Second Circuit's rule of preclusion conflicts with Parklane Hosiery, supra. The application of preclusion in the absence of a hearing conflicts with the Eleventh Circuit rule.

c. The procedure at SDHR failed to provide Mr. DeCintio with adequate due process protection.

Although in most cases, the federal courts should apply the preclusion rules of the host state, there are circumstances where this practice is inappropriate:

> As a general matter, even when issues have been raised, argued, and decided in a prior proceeding, and are therefore preclusive under state law, [r]edetermination of the issues [may nevertheless be] warranted if there is reason to doubt the quality, extensiveness, or fairness of procedures followed in prior litigation.

Haring v. Prosise, 462 U.S. 306, 317-318 (1983)(emphasis added).

In deciding whether certain agency's decisions should be entitled to preclusive effect this Court has looked to see whether the proceedings provided procedural safeguards comparable to those provided by a federal district court.

Thus the Court has held that unappealed arbitration decisions will not bar a subsequent suit under either Title VII or § 1983 because arbitration is not an adequate substitute for a judicial proceeding in protecting federal rights. Alexander v. Gardner-Denver, 415 U.S. 36 (1974); McDonald v. City of West Branch, 466 U.S. 284 (1984). As discussed above, the petitioner was deprived of the plenary procedural safeguards routinely afforded in federal district court. More than that, however, he was also deprived of a truly objective decisionmaker because of the SDHR's pecuniary interest in expedited disposition.

Pursuant to its yearly worksharing agreements with the EEOC, SDHR is paid a bounty or stipend of $400 for each acceptable resolution of a covered complaint. The contracts with the EEOC

contain a quota of resolutions which are supposed to be met by SDHR within the fiscal year. SDHR is thus under considerable pressure to resolve large numbers of cases in order to meet its quota. In recent years, the EEOC stipend has become a significant portion of the SDHR's budget.[12] At the same time that SDHR has become more dependent on funds from EEOC, and therefore faced more pressure to resolve cases quickly, its staffing levels have been reduced.[13] In

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[12] In fiscal year 1986-87, SDHR depended on federal funds for more than 20% of its budget. Out of a budget of $9,250,000, federal funds accounted for $2,300,000. The EEOC quota stipend totaled $1,500,000, requiring SDHR to resolve approximately 3700 cases to collect the full amount.

[13] In fiscal year 1982-83, the Division had a contractual obligation to resolve $700,000 worth of cases. On January 1, 1983, SDHR had 91 Human Rights Specialists (including Regional Directors). Although the contractual obligation has doubled, the number of staffing specialists has been signifi-

addition, SDHR has had to cope with a significant backlog of cases, which as of March 31, 1986, totaled almost 10,000 cases.[14]

Because of SDHR's substantial financial interest in resolving a large number of cases each year, giving preclusive effect to its determinations is a violation of due process. Tumey v. Ohio, 273 U.S. 510 (1927). In Tumey, this Court held that the conviction of a defendant by a judge who was to receive part of the fine violated due process because the judge had "a direct, personal substantial pecuniary interest in

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cantly reduced (On December 31, 1986 there were 66 Human Rights Specialists, a reduction of 27.5% from January 1, 1983). Id.

[14] For fiscal year 1987-88, New York State has provided more than $300,000 specifically to reduce the backlog of cases. In only three of the last ten years has SDHR resolved more complaints than have been filed.

reaching a conclusion against [Tumey]." 273 U.S. at 523. The Judge in Tumey was entitled to $12 from Tumey's fine. Here SDHR gets a bounty of $400 for each resolution. Although the bounty is not contingent upon ruling against a complainant, SDHR gets paid for resolutions, not for investigations. Since investigations take time and hearings take even more time, SDHR has a significant incentive to process charges quickly and with minimal effort. That is what happened to Mr. DeCintio's charge.

d. New York State would not have given preclusive effect to the determination.

The Second Circuit attempted to interpret University of Tennessee v. Elliott, supra, in light of Ryan v. New York Telephone Co., 62 N.Y. 2d 494, 478 N.Y.S.2d 823 (1984). While Elliott does hold that, when certain criteria are met,

preclusion may apply to a state agency decision if the decision would be entitled to preclusive effect in the state's own courts, the Second Circuit failed to note the determinative factors in Ryan which would have meant no preclusion in this case. Specifically, petitioner asserts that because of (1) the procedural deficiencies prevalent in all SDHR proceedings and (2) the inadequate "investigation" performed by the SDHR Regional Director in the instant litigation, New York Courts would not allow this SDHR proceeding to preclude his federal claims.

Although the preclusive effect to be given SDHR "no probable cause" findings has never been faced by New York Courts, an analysis of the relevant cases shows that preclusion would not apply in the present case. First, the court in Venes

v. Community School Board of District 26, 43 N.Y.2d 520, 524, 420 N.Y.S.2d 807, 809 (1978), held that preclusion does not apply to all administrative proceedings:

> "We need not decide whether such a generalization would be valid today, in light of the proliferation in both number and type of administrative agency hearings in recent years. Rather, we hold that in each case, the doctrine of res judicata is to be applied to an agency determination only if such application is consistent with the nature of the particular administrative adjudication." [Emphasis added]

In Ryan the court explained that preclusion should apply to administrative decisions "rendered pursuant to the adjudicatory authority of an agency to decide cases brought before its tribunal employing procedures substantially similar to those used in a Court of Law." 62 N.Y.2d at 499, 478 N.Y.S.2d at 826

(emphasis added).[15] Ryan also required that the complainant have "a full and fair opportunity in the prior administrative proceeding to contest the issue now said to be controlling." Id. 62 N.Y.2d at 501, 478 N.Y.S.2d at 826.

SDHR proceedings do not meet these criteria and, unlike the aministrative proceeding in Ryan, does not provide the complainant with an adversarial hearing, presided over by an administrative law judge, In re Shiplokoff's claim, 18 App. Div. 2d 1123, 238 N.Y.S.2d 1003 (1963), and a court-appointed attorney. N.Y. Labor Code §538(1)(e).

Further, the procedures in Ryan provided plaintiffs the opportunity to

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[15] The actual holding in Ryan i.e., that the agency must be acting in a judicial capacity, is thus consistent with the Seventh Circuit's decision in Buckhalter, supra, and inconsistent with the Second Circuit's ruling in this case.

present witnesses, testify on their own behalf and cross-examine the defendant and the defendant's witnesses. Cases since Ryan have relied on several characteristics in evaluating the preclusive effect of agency decisions: an adversarial hearing; entitlement to counsel; and opportunities for plaintiffs to present evidence and witnesses, to testify on their own behalf and to confront and cross-examine the defendant and the defendant's witnesses. See e.g., Jensen v. Old Westbury Zoning Board of Appeals, 515 N.Y.S.2d. 283, 284 (1987) (hearing held before the Zoning Board of Appeals); Engel v. Calgon Corp., 114 App. Div. 2d 108, 498 N.Y.S.2d 877, 878 (1986) (hearing held before Unemployment Insurance Appeal Board); Sam-Hammer v. Home Mutual Insurance Company, 120 App. Div. 2d 59, 507

N.Y.S.2d 499, 500 (1986) (hearing held before State Trooper Disciplinary Hearing Board; plaintiff represented by counsel and given an opportunity to cross-examine adverse witnesses); Manhasset Board of Education v. New York State Human Rights Appeal Board, 106 App. Div. 2d 364, 482 N.Y.S.2d 495, 496 (1984) (hearing held before Unemployment Insurance Appeal Board).

In marked contrast, SDHR proceedings do not even require that an evidentiary hearing be held before a complaint is dismissed for lack of probable cause. State Division of Human Rights v. New York State Drug Abuse Control Commission, 59 App. Div. 2d 332, 399 N.Y.S.2d 541, 544-545 (1977); Eastman Kodak Co. v. State Division of Human Rights, 44 App. Div. 2d 888; 355 N.Y.S.2d 676-677 (1977); Rashid v. American Elec. Power Service

Corp., 646 F. Supp. 251, 252 (S.D.N.Y. 1986). Instead, the courts have only required that once a complaint is filed, "the Regional Director of the office in which it is filed must make a prompt and fair investigation to determine whether there is probable cause to believe that the charged parties have committed illegal discrimination" before dismissing such complaint. Hendel v. New York State Division of Human Rights, 114 App. Div. 2d 897, 898, 495 N.Y.S.2d 135, 136 (1985). Further, the manner of the investigation is left totally to the discretion of the Regional Director and the investigation may consist of either a written or oral inquiry. Brown v. State Human Rights Appeal Board, 73 App. Div. 2d 606, 422 N.Y.S.2d 441, 442. Finally, the plaintiff has no right in an SDHR proceeding to cross-examine the

respondent and the respondent's witnesses. Jwayyed v. New York Telephone Company, 42 App. Div. 2d 663, 345 N.Y.S.2d 233, 235 (1973).

Each of these procedural deficiencies occurred in the present SDHR proceeding. Mr. DeCintio was denied an adversary hearing. Instead, the Regional Director opted for an "investigation" which consisted solely of his reviewing papers submitted to him by both parties. Mr. DeCintio was therefore barred from confronting and cross-examining the respondents and their witnesses. The respondents presented no sworn testimony, only letters from their attorney. Rather than "employ[ing] procedures substantially similar to those used in a court of law," SDHR did not even remotely approximate a court proceeding and its determination would not have been given

preclusive effect by New York courts.

Even assuming arguendo that New York courts would grant preclusive effect to some SDHR decisions without an adversarial hearing, such a rule would not apply to the proceeding in the instant litigation because of the inadequacy of the Regional Director's investigation. While the method of investigation is left to the discretion of the Regional Director (Brown v. State Human Rights Appeal Board, supra), New York courts have held that:

> The Legislature intended that before determining whether there is probable cause for a complaint, the Commissioner should give a complainant full opportunity to present on the record, though informally, his charges against his employer or other respondent, including the right to submit all exhibits which he wishes to present and testimony of witnesses in addition to his own testimony.

Gregory v. New York State Human Rights. Appeal Board, 64 App. Div. 2d 775; 407

N.Y.S. 2d 256, 257 (1978). The claimant must be given the opportunity to rebut evidence submitted in opposition by the defendant, Brown v. State Human Rights Appeal Board, supra, and the investigation must include a confrontation conference between the plaintiff and defendant, unless the plaintiff's complaint lacks merit as a matter of law. Gregory, supra, 407 N.Y.S 2d at 257-258. The Regional Director's investigation in the present case was inadequate given the above standards. The "investigation" consisted solely of the Regional Director reviewing papers and affidavits submitted by the petitioner, Mr. DeCintio, and general denials made without personal knowledge by the respondents' attorney. There was no confrontation at SDHR.

Far from being entitled to

preclusive effect, it is doubtful whether such an investigation could even sustain a finding of no probable cause if appealed to the state court. Gregory v. New York State Human Rights Appeal Board, supra, and Hendel v. New York State Division of Human Rights, supra. In Gregory, the court reversed the SDHR's finding of no probable cause where the investigation consisted only of the Regional Director interviewing the parties and their witnesses stating, "no conference with all principals present was ever held. Neither was he [the plaintiff] given the opportunity to rebut the respondent's answers to his complaint." 407 N.Y.S.2d at 258. In Hendel, the court overturned the finding of no probable cause noting that "the 'investigation' consisted of no more than an examination of the papers submitted by

the parties. There was no conference." 495 N.Y.S.2d at 136.

Mr. DeCintio elected not to appeal the SDHR findings of no probable cause because he intended to pursue his federal statutory remedies and believed that SDHR's adverse findings would not prejudice exercise of his federal rights.[16]

In summary, the court of appeals ruling that a no probable cause finding by the New York State Division of Human Rights precludes non-Title VII claims in federal court conflicts with decisions in

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[16] SDHR also shares this belief and includes the following advisory in its determinations:

> PLEASE TAKE FURTHER NOTE that a complainant who seeks judicial review, and who receives an adverse decision therein, may lose his or her right to proceed subsequently in federal court under Title VII, by virtue of Kremer vs. Chemical Construction Co., 456 U.S. 461 (1982).

this Court and in at least two other circuits. Given these conflicts and the recurrence and importance of the issue, certiorari should be granted to resolve the issue in the present case.

CONCLUSION

For the foregoing reasons certiorari should be granted and the decision of the court below reversed with respect to non-Title VII claims.

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APPENDIX

UNITED STATES COURT OF APPEALS,
SECOND CIRCUIT

No. 152, Docket 86-7260

Argued Sept. 15, 1986
Decided June 8, 1987.

ANTHONY J. DeCINTIO,

Plaintiff-Appellant,

v.

WESTCHESTER COUNTY MEDICAL CENTER; County of Westchester,

Defendants-Appellees.

==========

Anne Golden, White Plains, N.Y. (Silverman & Sapir, Donald L. Sapir, White Plains, N.Y., of counsel), for plaintiff-appellant.

Colleen Lundwall Kellman, Asst. Co. Att., White Plains, N. Y. (Henry J. Logan, Westchester Co. Atty., Kenneth E. Powell, Deputy Co. Atty., White Plains, N.Y., of counsel), for defendants-appellees.

Before OAKES, MINER and MAHONEY, Circuit Judges.

MAHONEY, Circuit Judge:

Plaintiff appeals from a judgment of

the United States District Court for the Southern District of New York dismissing his complaint.[1] This retaliation case was brought to redress the alleged deprivation of rights secured to plaintiff by Title VII of the Civil Rights Act of 1964 (42 U.S.C. § 2000e et seq. (1982)), 42 U.S.C. §§ 1981 and 1983 (1982), the Fair Labor Standards Act (29 U.S.C. S 215(a)(3) (1982)), and the fourteenth amendment.

Background

Anthony DeCintio was one of several Westchester County Medical Center staff respiratory specialists who sued the medical center and the county under Title VII, alleging sex discrimination. That

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[1] Since, as will appear, matters outside the pleading were presented to and not excluded by the district court, the motion to dismiss was in effect treated as one for summary judgment and disposed of as provided in Fed.R.Civ.P. 56, pursuant to Fed.R.Civ.P. 12(b)(6).

case was recently decided, adversely to DeCintio, by this court. DeCintio v. Westchester County Medical Center, 807 F.2d 304 (2d Cir. 1986). Appellant alleges in this action that appellees retaliated against him, by suspending and firing him, because he was the "ringleader" of the disaffected respiratory specialists.

Appellees counter that DeCintio was fired for violating hospital policy on two occasions. Specifically, the hospital charges DeCintio with failure to respond properly to an emergency situation on May 23, 1984 when he refused to deliver a ventilator to the emergency room as requested by nurse Stephen Marchwinski. The patient in question was in critical condition. The hospital also charges DeCintio with failure to respond properly, on February 6, 1985, to several

respiratory therapy "stat" pages emanating from the emergency room where nurses and doctors were caring for a critically ill patient.[2]

One day after the February 6 incident, DeCintio was suspended without pay for thirty days. A hearing was thereafter held pursuant to N.Y.Civ.Serv.Law § 75 (McKinney 1983 & Supp.1987). The hearing officer found DeCintio guilty of misconduct and incompetence based on the May, 1984 and February, 1985 incidents, and recommended that appellant be "terminated from employment." The hearing officer's recommendation was accepted by Westchester County Medical Center Commissioner Bernard M. Weinstein, who

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[2] In addition, DeCintio allegedly failed to order two respiratory therapists, who were on lunch break, to respond to the calls.

informed appellant of his immediate dismissal by letter dated June 26, 1985.

On November 9, 1984, and July 13, 1985, appellant filed complaints with the New York State Division of Human Rights ("SDHR") charging the medical center with retaliation. SDHR dismissed both complaints for lack of probable cause on November 27, 1985. The instant action was commenced on December 6, 1985.

Unsworn Statements

At the outset, we are faced with an attack on the procedural bona fides of certain written statements attached to appellant's sworn affidavit submitted in opposition to the motion to dismiss (which, as indicated in note 1 supra, was in effect treated as a motion for summary judgment). No objection was made to the form of such statements below. On appeal, however, appellees contend that

Fed.R.Civ.P. 56(e) precludes their consideration, below and here, in opposition to appellees' motion.

The first statement is a typed declaration that:

> The persons who have signed this paper are willing to appear before a Federal Judge and tell him that:
>
> 1) They are members of the Respiratory Therapy Department at the Westchester County Medical Center.
>
> 2) Each and every one of them has responded to "stat calls" and personal notifications of an emergency situation in the same manner as Mr. DeCintio has so responded.
>
> 3) Mr. DeCintio has been suspended and terminated from

employment at the Westchester County Medical Center for so responding.

4) None of the persons signing below has been disciplined by the hospital administration for acting likewise.

5) The hospital administration has been made aware of the way we have responded since we have been employed by them.

The statement is signed by six individuals. A second identical typed statement signed by five individuals was also attached to appellant's sworn affidavit.

A third statement signed by one C. Follini states that Assistant Personnel Director Jeffrey Sweet told Follini, "I know Tony [appellant] is the ringleader . . . but he won't be around much longer, we will get him out."

A fourth statement signed by respiratory therapist Peter Piazza charges that Mr. Sweet, in the course of a discussion about the legal action brought against the hospital, told Piazza that "in the past year I have personally fired three members of the Respiratory Therapy Department, and no amount of fighting back will enable them to come back, ever again." Whereupon Associate Hospital Director Edward Stolzenberg allegedly interjected, "everyone in the Respiratory Therapy Department can be fired and completely replaced." This conversation is asserted to have occurred during DeCintio's suspension but prior to his termination.

Appellees are now objecting for the first time that the statements attached to appellant's sworn affidavit are not themselves sworn or certified as required

by Fed.R.Civ.P. 56(e), which provides in pertinent part:

> Rule 56. Summary Judgment . . . .
> (e) Form of Affidavits; Further Testimony; Defense Required. Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith.

Fed.R.Civ.P. 56(e) (emphasis added).

This court has ruled, however, that Rule 56(e) defects are waived where, as here, no motion to strike is directed to them below. In Re Teltronics Services, Inc., 762 F.2d 185, 192 (2d Cir. 1985).[3] As best we have been able to ascertain,

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[3] In an earlier case, we determined that even if a motion to strike is made, it will be ineffective unless it identifies the defects in the affidavit under attack with adequate specificity. Perma Research and Development Co. v. Singer Co., 410 F.2d 572, 579 (2d Cir. 1969).

the courts that have considered the question are in unanimous accord. See, e.g., Davis v. Sears, Roebuck and Co., 708 F.2d 862, 864 (1st Cir. 1983); Scharf v. United States Attorney General, 597 F.2d 1240, 1243 (9th Cir. 1979); Williams v. Evangelical Retirement Homes, 594 F.2d 701, 703-04 (8th Cir. 1979); Associated Press v. Cook, 513 F.2d 1300, 1303 (10th Cir. 1975); Klingman v. National Indemnity Co., 317 F.2d 850, 854 (7th Cir. 1963). See also 6 J. Moore & J. Wicker, Federal Practice ¶56.22[1], at 56-1330 (1986); 10A C. Wright, A. Miller & M. Kane, Federal Practice and Procedure § 2738, at 507-09 (1983).[4]

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[4] There is also authority for the proposition that a non-movant's papers will be examined less stringently on a motion for summary judgment than those of the movant. Lew v. Kona Hospital, 754 F.2d 1420, 1423 (9th Cir. 1985); Maiorana v. MacDonald, 596 F.2d 1072, 1080-81 (1st Cir. 1979); Washington v. Cameron, 411 F.2d 705, 709-10 (D.C. Cir. 1969). See

[1, 2] It would be especially inappropriate to disregard unsworn attachments to appellant's affidavit in opposition to the motion for summary judgment in this case, since the district court considered unsworn and uncertified attachments to the affidavits provided by both sides. In particular, the district court appears to have been heavily influenced by the report of Hearing Officer Herbert Morris,[5] which was attached as Exhibit C to appellees' moving affidavit and was not sworn or certified, as Rule 56(e) requires. See Mitchell v. Beaubouef, 581 F.2d 412, 415 (5th Cir. 1978). It would be unfair to

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also 10A C. Wright, A. Miller & M. Kane, Federal Practice and Procedure § 2738 n. 31, at 484 (1983).

[5] Mr. Morris conducted the hearing pursuant to Section 75 of the Civil Service Law which resulted in appellant's dismissal.

preclude consideration of appellant's unsworn statements, which were clearly considered below (although deemed by the district court "hardly probative of anything"), where the judgment entered against appellant and before us on this appeal gave considerable weight to similarly defective documents tendered by appellees. Had appellees objected below to the introduction of appellant's unsworn statements, appellant could presumably have taken steps to meet that objection.[6] We conclude that the failure to complain below had the consequence of waiving the objection, and the unsworn statements are properly before us.

As will appear, at least with these statements taken into account, appellant

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[6] One can gather as much from the stated willingness of numerous signatories to "appear before a Federal Judge" and tell their stories.

was entitled to the denial of summary judgment as to aspects of his Title VII claim, but not as to the balance thereof or as to any of his other claims.

Title VII Claim

University of Tennessee v. Elliot, ____ U.S. ____, 106 S.Ct. 3220, 92 L.Ed.2d 635 (1986), establishes the basic proposition that appellant is entitled to a trial de novo on his Title VII claim, since he did not seek state court review of the SDHR administrative proceedings adjudicated against him. As was there stated, after reviewing the legislative language and history of Title VII and pertinent Supreme Court precedents, "Congress did not intend unreviewed state administrative proceedings to have preclusive effect on Title VII claims." 106 S.Ct. at 3225.

[3, 4] To make out a prima facie

case of retaliation under Title VII, appellant must show: protected participation or opposition under Title VII known by the alleged retaliator; an employment action disadvantaging the person engaged in the protected activity; and a causal connection between the protected activity and the disadvantageous employment action. Grant v. Bethlehem Steel Corp., 622 F.2d 43,46 (2d Cir. 1980). Proof of causal connection can be established indirectly by showing that the protected activity was followed closely by discriminatory treatment, Davis v. State University of New York, 802 F.2d 638, 642 (2d Cir. 1986), or through other evidence such as disparate treatment of fellow employees who engaged in similar conduct, Simmons v. Camden County Board of Education, 757 F.2d 1187, 1188-89 (11th Cir.), cert.

denied, ____ U.S. ____, 106 S.Ct. 385, 88 L.Ed.2d 338 (1985), or directly through evidence of retaliatory animus directed against a plaintiff by the defendant. 3 A. Larson & L. Larson, Employment Discrimination §87.31 (1986 & Supp. 1987); see also Hochstadt v. Worcester Foundation for Experimental Biology, Inc., 425 F.Supp. 318, 328-29 (D. Mass.), aff'd, 545 F.2d 222 (1st Cir. 1976). Once a plaintiff has established his prima facie case, the employer must show a legitimate non-discriminatory reason for the alleged mistreatment. Grant, 622 F.2d at 46. The employee is then afforded an opportunity to prove that the employer's proffered reason for its conduct is pretextual. Choudhury v. Polytechnic Institute of New York, 735 F.2d 38, 44 (2d Cir. 1984).

In the instant case, appellant

brought before the district court evidence that he was a plaintiff in a Title VII action then pending against appellees, and that appellees (through their supervisory personnel) knew of appellant's activities. DeCintio further showed that he was fired within one year of the filing of the original Title VII action. Finally, DeCintio profferred, through party admissions of Jeffrey Sweet and Edward Stolzenberg, and through the statements of fellow employees that they were not disciplined for engaging in identical behavior, direct and indirect evidence of a causal connection between protected activity and retaliation. In this connection, the district court's statement that the hospital's failure to discharge other employees for their similar derelictions is "hardly probative of anything" is not supported by the

authorities. Hill v. Coca Cola Bottling Co., 786 F.2d 550, 553 (2d Cir. 1986).

[5] Appellees offered evidence showing that DeCintio was fired for gross misconduct. According to De Cintio's sworn affidavit, however, he acted properly and in accordance with hospital policy in both the May and February incidents, a conclusion partially corroborated by the sworn affidavit of Robert Burns, Chief Respiratory Therapist at the medical center from November 1982 to February 1984.[7] Even if there were no

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[7] With respect to his conduct during the May 1984 incident, DeCintio's affidavit states that the request for the ventilator was made without proper authorization from a doctor, in contravention of hospital policy. The Burns affidavit confirms DeCintio as to the pertinent hospital policy. With respect to the February 1985 incident, DeCintio's affidavit stated that he responded to the "stat" pages from Stephen Marchwinski by sending an assistant, Jose Gomes, to the emergency room. The affidavit further indicates that therapists Gloria Drenga and Michael

dispute as to the impropriety of DeCintio's conduct, the evidence of retaliatory animus on the hospital's part would suffice to defeat the summary judgment motion. Rodriguez v. Board of Education, 620 F.2d 362, 367 (2d Cir. 1980). We therefore hold that there are genuine issues of material fact with respect to appellant's Title VII claim, and that the grant of summary judgment on this claim in favor of appellees was

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Garayua, who were under DeCintio's supervision and were taking a lunch break, did not answer any of the "stat" calls from Nurse Marchwinski in accordance with hospital policy, reflected in a memorandum posted on the departmental bulletin board which stated that therapists should not work during lunch hour because they would not be paid. The Burns affidavit states that the memorandum in question was written and posted by Burns at the direction of Assistant Hospital Administrator Pradeep Gupte.

accordingly inappropriate.[8] In doing so, we do not deprecate the burden which plaintiff will face at trial in establishing that the grounds for defendants' dismissal of plaintiff were

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[8] The district court found no evidence that Jeffrey Sweet, an employee of the hospital alleged to have expressed retaliatory animus against appellant, had any impact upon the decision of Hearing Officer Morris or upon Medical Center Commissioner Weinstein, who discharged appellant based upon Morris's hearing report. In the event, however, that appellees were motivated by retaliatory animus in instituting the Section 75 proceeding, Title VII would be violated even though there were objectively valid grounds for the proceeding and the resulting discharge. Hill v. Coca Cola Bottling Co., 786 F.2d 550, 553 (2d Cir. 1986), applies this rule to racial discrimination violative of 42 U.S.C. § 2000e-2(a) (1982); we deem the same rule to apply to retaliatory discrimination violative of 42 U.S.C. § 2000e3(a) (1982). In terms of the traditional analysis in this area, the issue in either case would be whether the asserted basis for the hospital's action was pretextual. McDonnell Douglas Corp. v. Green, 411 U.S. 792, 804-05, 93 S.Ct. 1817, 1825, 36 L.Ed.2d 668 (1973); Choudhury v. Polytechnic Institute of New York, 735 F.2d 38, 44 (2d Cir. 1984).

pretextual, given the gravity of the life-threatening situations upon which those grounds were based.

Other Claims

[6] Appellees maintain that appellant's claim for relief under 28 U.S.C. § 1983 is barred by collateral estoppel.[9] Although the parties have focused most of their attention on the preclusive effect of the Section 75 proceeding, they have also discussed DeCintio's retaliation complaint before the SDHR, which resulted in a finding of no probable cause.[10]

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[9] Our analysis of appellant's section 1983 claim is equally applicable to all of his claims which are not based on Title VII. See note 13, infra.

[10] Collateral estoppel is an affirmative defense that must usually be pleaded. Fed.R.Civ.P. 8(c); 18 C. Wright, A. Miller & E. Cooper, Federal Practice & Procedure § 4405 (1981). Appellees' Affidavit In Support Of Motion To Dismiss Or For Summary Judgment sets forth in detail DeCintio's charges before

Appellees contend that DeCintio is precluded from litigating the retaliatory discharge question because the Section 75 hearing was decided adversely to him. Appellant counters that he did not have a full and fair opportunity to litigate the issue, since the Section 75 proceeding was almost exclusively concerned with whether the charges of misconduct levelled against him were true.

University of Tennessee v. Elliott establishes that:

SDHR as well as the facts behind his New York Civil Service Law § 75 hearing. DeCintio has assumed throughout the litigation that appellees were raising the collateral estoppel issue. We conclude that the issue is properly before us. W. E. Hedger Transportation Corp. v. Ira S. Bushey & Sons, Inc., 186 F.2d 236, 237 (2d Cir. 1951); see also American Furniture Co. v. International Accommodations Supply, 721 F.2d 478 (5th Cir. 1981). The lower court's failure to rule against appellant on collateral estoppel grounds does not preclude our doing so. LaRocca v. Gold, 662 F.2d 144, 148 (2d Cir. 1981).

> [W]hen a state agency "acting in a judicial capacity . . . resolves disputed issues of fact properly before it which the parties have had an adequate opportunity to litigate," [United States v.] Utah Construction & Mining Co., supra, 384 U.S., [394], at 422, 86 S.Ct. [1545] at 1560 [16 L.Ed.2d 642 (1966)], federal courts must give the agency's factfinding the same preclusive effect to which it would be entitled in the State's courts.

____ U.S. at ____, 106 S.Ct. at 3227.[11]

[7] Here, DeCintio had an adequate opportunity to litigate the retaliation issue in his Section 75 hearing, although he appears on the record before us not to have availed himself significantly of that opportunity, in view of a provision of New York law which became effective on September 1, 1984 and established a prohibition against retaliatory action by

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[11] As indicated supra, p. 115, Elliott explicitly excluded Title VII claims from the operation of this rule, based upon the language and legislative history of Title VII. See also note 13, infra.

public employers, which prohibition could be asserted as a defense in a Section 75 proceeding. N.Y. Civil Service Law § 75-b (McKinney Supp. 1987). Preclusion is therefore appropriate if the courts of New York would so rule. Migra v. Warren City School District Board of Education, 465 U.S. 75, 83-85, 104 S.Ct. 892, 897-98, 79 L.Ed.2d 56 (1984). In any event, furthermore, the retaliation issue was in fact litigated in the proceeding before SDHR.

The rule of University of Tennessee v. Elliott accordingly requires that we give to these administrative proceedings the preclusive effect which they would be accorded by the courts of New York. In this regard, Ryan v. New York Telephone Co., 62 N.Y.2d 494, 467 N.E.2d 487, 478 N.Y. S.2d 823 (1984), establishes that under New York law:

> [T]he doctrines of res judicata and collateral estoppel are applicable to give conclusive effect to the quasi-judicial determinations of administrative agencies . . . when rendered pursuant to the adjudicatory authority of an agency to decide cases brought before its tribunals employing procedures substantially similar to those used in a court of law. . . .
>
> . . . .
>
> Of course, the issue must have been material to the first action or proceeding and essential to the decision rendered therein . . . and it must be the point actually to be determined in the second action or proceeding such that "a different judgment in the second would destroy or impair rights or interests established by the first" . . . .
>
> . . . .
>
> In the application of collateral estoppel with respect to administrative determinations, the burden rests upon the proponent of collateral estoppel to demonstrate the identicality and decisiveness of the issue, while the burden rests upon the opponent to establish the absence of a full and fair opportunity to litigate the issue in prior action or proceeding.

62 N.Y.2d at 499-501, 467 N.E.2d at 489-91, 478 N.Y.S.2d at 825-27 (citations omitted).

The evidence presented to the

district court showed that the sole basis of DeCintio's complaints to SDHR was the alleged retaliatory discrimination of appellees. The November 1984 complaint charged the medical center with general harassment and retaliation, and the February 1985 complaint charged retaliation based on DeCintio's suspension. The SDHR Regional Director, following an "investigation and . . . review of related information and evidence with named parties," found no probable cause to support DeCintio's complaint, because, inter alia, "[t]here is no evidence that Respondent retaliated against Complainant." In his Rule 3(g) Statement of Material Disputed Facts, DeCintio stated that:

> 11. The continuing harassment and other retaliatory conduct referred to in the complaint filed by plaintiff with the New York State Division of Human Rights on or about November 9, 1984 was fleshed out

> during the course of the administrative proceedings and includes the conduct set forth in the complaint filed by plaintiff with this court.

Also in the record is a letter brief to the district court from appellant's attorneys, the same attorneys who represented appellant before the SDHR, stating that:

> In the instant case, the retaliatory conduct complained of by plaintiff was actually investigated by the State Division and EEOC as is made abundantly clear by the affidavits of plaintiff and plaintiff's former supervisor, Robert Burns, which were submitted to the State Division as part of its investigation. The determination of the EEOC was based upon the record and investigation made by the State Division.

The SDHR does not make a probable cause determination until the complainant has had "full opportunity to present on the record, though informally, his charges against his employer or other respondent, including the right to submit

all exhibits which he wishes to present and testimony of witnesses in addition to his own testimony." State Division of Human Rights v. New York State Drug Abuse Control Commission, 59 A.D.2d 332, 336, 399 N.Y.S.2d 541, 544 (4th Dept. 1977). Only where the record indicates "that there was a thorough inquiry during which the complainant was afforded a full opportunity to present her contentions," or where a complaint "lacks merit as a matter of law," will an SDHR dismissal based on lack of probable cause be upheld. Flah's Inc. v. Schneider, 71 A.D.2d 993, 420 N.Y.S.2d 283, 284 (2d Dept. 1979). See also the discussion of SDHR procedures in Kremer v. Chemical Construction Corp., 456 U.S. 461, 483-85, 102 S.Ct. 1883, 1898-99, 72 L.Ed.2d 262

(1982).[12]

Given the foregoing, it is apparent that appellant would be precluded under New York law from relitigating the retaliation issue brought before the SDHR. The retaliation issue was obviously material to the SDHR proceeding and "essential to the decision rendered therein." Ryan at 62 N.Y.2d 500, 467 N.E.2d 490, 478 N.Y.S.2d 826. Far from establishing that he did not have a full

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[12] In view of these subsequent cases, and the ruling in Emil v. Dewey, 49 N.Y.2d 968, 406 N.E.2d 744, 428 N.Y.S.2d 887 (1980), that the mere filing of a complaint with SDHR "precludes the plaintiff from commencing an action in court based on the same incident," see also, Spoon v. American Agriculturalist, Inc., 103 A.D.2d 929, 478 N.Y.S.2d 174 (3d Dept. 1984), the question raised by this court in Mitchell v. National Broadcasting Co., 553 F.2d 265, 273 n. 10 (2d Cir. 1977), as to the finality of an SDHR determination of no probable cause should be deemed resolved in favor of finality. See Kirkland v. City of Peekskill, 651 F.Supp. 1225, 1230 n. 2 (S.D.N.Y. 1987).

and fair opportunity to litigate, DeCintio admits to having "fleshed out" the issues at the SDHR hearing. We hold that DeCintio is precluded from relitigating the retaliatory discrimination issue in a federal action based on 42 U.S.C. § 1983.[13]

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[13] The same analysis applies to DeCintio's claims under 42 U.S.C. § 1981, 29 U.S.C. § 215(a)(3), and the fourteenth amendment; Elliott precludes recovery. The holding in Elliott as to the preclusive effect of administrative rulings specifically applied to an action brought under the first, thirteenth and fourteenth amendments and 42 U.S.C. §§ 1981, 1983, 1985, 1986 and 1988 (commonly referred to as the Reconstruction Civil Rights Statutes). See Elliott v. University of Tennessee, 766 F.2d 982, 987 (6th Cir. 1985), affirmed in part and reversed in part, ____ U.S. ____, 106 S.Ct. 3220, 92 L.Ed.2d 635 (1986). Moreover, nothing in the statutory language of the Reconstruction Civil Rights Statutes or 29 U.S.C. § 215 (a)(3) calls for the kind of exception to collateral estoppel principles that Elliott fashioned for Title VII actions. The Title VII exception was based substantially upon the wording of 42 U.S.C. § 2000e-5(b), which requires the Equal Employment Opportunity Commission to give "substantial weight" to the

Conclusion

The district court's dismissal of appellant's Title VII claim is reversed and remanded for further proceedings consistent herewith.[14] The district court's dismissal of appellant's other claims is affirmed.

MINER, Circuit Judge, dissenting:

Because the record is clear that

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findings of state or local authorities charged with enforcing anti-discrimination laws. The Supreme Court thought "it would make little sense for Congress to write such a provision if state agency findings were entitled to preclusive effect in Title VII actions in federal court." Elliott, ____ U.S. at ____, 106 S.Ct. at 3225.

[14] The district court is reversed only as to the question of DeCintio's suspension and dismissal. DeCintio's allegations that he was improperly denied promotions, refused transfer to the day shift, and disciplined for arguing with a female employee were buttressed by no supporting material and were amply refuted by opposing affidavits and documents.

DeCintio was dismissed from his hospital employment for gross derelictions of his professional duty and for no other reason, I would affirm the summary judgment entered in favor of Westchester County Medical Center.

Without question, DeCintio established a prima facie case of retaliation against the Medical Center by showing that he filed a Title VII claim of discrimination and thereafter was dismissed from his position. See Grant v. Bethlehem Steel Corp., 622 F.2d 43, 46 (2d Cir. 1980). It then became incumbent upon the Medical Center to carry the burden of demonstrating a legitimate, nondiscriminatory motive for the discharge. Davis v. State University of New York, 802 F.2d 638, 642 (2d Cir. 1986). The employer carried that burden by submitting convincing evidence that

DeCintio's behavior in two life-threatening situations was not worthy of any respiratory therapist, let alone the Assistant Chief of the Respiratory Therapy Department, a position to which DeCintio was promoted after the filing of his original Title VII claim with the EEOC.

The situation on May 23, 1984 involved a one year old child who was brought to the Medical Center in severe respiratory distress. The Head Nurse in the Emergency Department, Stephen Marchwinski, testified at the hearing held pursuant to section 75 of the New York Civil Service Law that he called the Respiratory Department and told DeCintio, who was the day supervisor there, that he needed a pediatric ventilator. When DeCintio told him that a physician's order was necessary before a ventilator

could be brought to the Emergency Room, the Head Nurse went to the Respiratory Department and renewed his request in person. According to the Head Nurse, DeCintio responded that only a doctor could order the equipment and then advised the other therapists not to respond. Another member of the Respiratory Department provided the equipment without further demand for authorization. In an affidavit submitted to the State Division of Human Rights, DeCintio substantially admitted these allegations: "Because of the apparent lack of a doctor's order and because I knew Mr. Marchwinski frequently attempted to order equipment on his own, contrary to hospital policy, I declined to get a ventilator without such an order and without specification of the type of ventilator needed." Joint App. at 89.

His conduct on that occasion can only be characterized as shocking.

The incident of February 6, 1985 involved a patient who had been brought to the Emergency Department by helicopter. A ventilator provided for the patient malfunctioned, and Dr. John Savino, Chief of Trauma, ordered Head Nurse Marchwinski to place a "stat" call to the Respiratory Department for another ventilator. A "stat" call indicates that there is an emergency and that immediate attention is required. According to Marchwinski, the call went unanswered, and he proceeded to the Respiratory Department, where he found some therapists on lunch break. He then located DeCintio, who said he would take care of the situation. When no assistance was forthcoming, Dr. Savino proceeded to the Respiratory Department

and restated the need for a ventilator in no uncertain terms. Eventually, the equipment was provided. DeCintio complains that "he was disciplined not because he himself failed to answer 'stat' pages but because he, as a supervisor, had failed to order other staff respiratory therapists on their lunch break to do so." Brief for Plaintiff-Appellant at 4. "DeCintio contends that in not giving that order he acted in accordance with Hospital policy." Id. The policy purportedly prohibited Respiratory Department employees from working during their lunch hour. The contention was and is ludicrous, and DeCintio understandably was suspended from his employment the following day. Dr. Savino believed this his patient's life was endangered in the incident.

To support his claim that there are genuine issues of material fact regarding his discharge, DeCintio submitted two identical, unsworn statements by members of the Respiratory Therapy Department. The statements were signed by a total of eleven department members, who asserted that they were "willing to appear before a Federal Judge" and testify: that each had responded to "stat" calls in the same manner as DeCintio; that the hospital was aware that they had so responded; and that none had been suspended or terminated for so responding. The statements have no probative value, however, because the signatories do not indicate, in any way, any knowledge of how DeCintio responded to "stat" calls on any particular occasion. It makes no sense to say that each therapist responded to each call in the same manner

as DeCintio. Moreover, little credence can be given to allegations presented to the court in the form employed in these statements.

Two other unsworn statements were submitted in opposition to the motion for summary judgment. In a statement dated August 8, 1985, Christopher Follini, a technician in the Respiratory Therapy Department, asserted that he went to the office of Jeffrey Sweet, Assistant Personnel Director of the Medical Center, to discuss certain charges brought against him. At that meeting, alleged to have taken place in October of 1984, Mr. Sweet is said to have told Mr. Follini that DeCintio was a "ring leader" who "won't be around much longer." The second statement was given by Peter A. Piazza, a staff respiratory therapist, who related a conversation that took

place in Mr. Sweet's office on April 26, 1985. During that conversation, Mr. Sweet is alleged to have expressed general dissatisfaction with the Respiratory Therapy Department, stated that he had never lost a case, and asserted that three people he had fired would never return to employment. During the same conversation, Associate Hospital Director Edward Stolzenberg is alleged to have said that the Respiratory Therapy Department could be taken over by the Nursing Department and that all personnel in Respiratory Therapy could be fired and replaced. Mr. Piazza expressed his "belief" that the comments "directly relate[d] to the well-being of Mr. Anthony J. DeCintio."

The Follini statement raises no triable issue of retaliatory animus. Sweet's comment to Follini made no

reference to retaliation, and, in light of DeCintio's previous unprofessional conduct, Sweet's desire to terminate the employment of DeCintio was quite understandable. Moreover, DeCintio's employment continued for an additional four months, until the second incident, providing further evidence of a lack of retaliatory animus. As to the Piazza statement, we have nothing other than the belief of Piazza that Sweet and Stolzenberg were referring to DeCintio in the conversation of April 26, 1985. Even if they were referring to him, DeCintio already was under suspension for his life-endangering conduct, and it hardly would have been unusual for hospital administrators to concern themselves with the reorganization of the Respiratory Therapy Department under the circumstances.

A motion for summary judgment requires the court to undertake "the threshold inquiry of determining whether there is a need for a trial -- whether, in other words, there are any genuine factual issues that properly can be resolved only by a finder of fact because they may reasonably be resolved in favor of either party." Anderson v. Liberty Lobby, Inc., ____ U.S. ____, ____, 106 S.Ct. 2505, 2511, 91 L.Ed.2d 202, 213 (1986). We have held that "the salutary purposes of summary judgment -- avoiding protracted, expensive and harassing trials -- apply no less to discrimination cases than to commercial or other areas of litigation." Meiri v. Dacon, 759 F.2d 989, 998 (2d Cir.)(conclusory allegations of discrimination insufficient to defeat defendants' motion for summary judgment in Title VII case), cert. denied, ____

U.S. ____, 106 S.Ct. 91, 88 L.Ed.2d 74 (1985).

Here there are no genuine material issues of fact that can "reasonably" be resolved in DeCintio's favor to support his claim of retaliation. This simply is a case where a health professional was derelict in his duties and was fired for his derelictions. Even a retaliatory motive "does not establish a Title VII violation unless it was causally related to the adverse action, not merely in the mind of the employer." Davis, 802 F.2d at 645 (Newman, J., concurring). DeCintio was wholly unable to demonstrate a causal relationship between the termination of his employment and any retaliatory intent on the part of the Medical Center. He therefore is unable to satisfy the "but for" test. Id.

To summarize: DeCintio's conduct on

two separate occasions, which jeopardized the lives of persons for whose care his employer was responsible, established a legitimate, nondiscriminatory, non-retaliatory motive for his discharge. He has failed to show that, even if there was a retaliatory motive behind his discharge, there was a causal relation between that motive and the discharge. Finally, there is no factual basis for a claim that the reasons given for the discharge were pretextual in nature. Grant, 622 F.2d at 46. As to all these matters, the evidence "is so one-sided that [defendants] must prevail as a matter of law." Anderson, ____ U.S. at ____, 106 S.Ct. at 2512, 91 L.Ed.2d at 214.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

ANTHONY J. DeCINTIO,	:	
	:	
Plaintiff,	:	85 CIVIL
	:	9551-CLB
-against-	:	
	:	JUDGMENT
WESTCHESTER COUNTY MEDICAL CENTER; COUNTY OF WESTCHESTER,	:	
	:	
Defendants,	:	

Defendant(s) having moved for an order pursuant to Rule 12(b)(1) and (6) F.R.Civ.P., and the said motion having come before the Honorable Charles L. Brieant, United States District Judge, and the Court thereafter on March 5th, 1986, having handed down its endorsement, granting the said motion, it is

ORDERED, ADJUDGED AND DECREED: That the complaint be and it is hereby dismissed.

/s/Raymond F. Burghardt
Clerk

March 6th, 1986
Dated: White Plains, N.Y.

DISTRICT COURT RULING ON
MOTION FOR SUMMARY JUDGMENT

Endorsement

ANTHONY J. DeCINTIO, Plaintiff	)	
vs.	)	85 Civ. - 9551-CLB
WESTCHESTER COUNTY MEDICAL CENTER; COUNTY OF WESTCHESTER,	)	
Defendants	)	

The within motion is granted and the action is dismissed. Ordinarily, in an employment discrimination case, motivation is an issue of fact, and if there is evidence supporting plaintiff's claim that the conduct of the employer concerning which he complains was invidiously motivated, then the issue must be tried. Here, however, their is

no evidence that the disciplinary proceedings invoked against plaintiff were merely pretextual, and brought to harass or retaliate against him for asserting prior claims of sex discrimination in employment.

Plaintiff, employed in defendant's hospital as a respiratory therapist in the competitive class under the New York Civil Service Law, was accused of specific acts of serious misconduct, under § 75 New York Civil Service Law, on specific dates, May 23, 1984 and February 6, 1985 in that he failed on two separate occasions to respond to an emergency situation in an appropriate manner. He received an evidentiary hearing before Hearing Officer Herbert Morris, and as a result of the hearing was discharged by Commissioner Weinstein. More than adequate evidence to support the findings

of the Hearing Officer is described in his report.

While this Court agrees with plaintiff's position that he can relitigate the findings of the Hearing Officer de novo in this case, before he may do so, he must come forward on this motion with some evidence that the charges were pretextual. There is no showing that Jeffrey Sweet had any impact in the decisions of Morris or Weinstein, and he denies the hearsay statements attributed to him. That others say they were not discharged for their own similar derelictions is hardly probative of anything.

The Clerk shall enter final judgment.

So Ordered.

Dated: White Plains, New York
March 5, 1986

Charles Brieant/s/
Charles L. Brieant
U.S.D.J.

EEOC DETERMINATION

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
New York District Office
90 Church Street, Room 1501
New York, New York 10007

Anthony J. De Cinto
55 Mamaroneck Road
Scarsdale New York 10583

Charge No.:
021-85-0853

Charging Party

Westchester Company Medical Center
Valhalla, New York 10721

Respondent

DETERMINATION

Under the authority vested in me by the Commission's Procedural regulations, I issue on behalf of the Commission, the following determination as to the merits of the subject charge.

Respondent is an employer within the meaning of Title VII and the timeliness, deferral and all other jurisdictional requirements have been met.

The New York State Division of Human

Rights has concluded that there is not reasonable cause to believe that the charge is true and the Commission adopts this determination as its own.

This determination concludes the Commission's Processing of the subject charge. Should the charging party wish to pursue this matter further, he or she may do so by filing a private action in Federal District Court within 90 days of receipt of this letter and by taking the other procedural steps set out in the enclosed NOTICE OF RIGHT TO SUE.

On behalf of the Commission:

Edward Mercado/s/
Edward Mercado
District Director

Mar-7 1986
Date

Enclosure: Notice of Right to Sue

DETERMINATION BY NEW YORK
STATE DIVISION OF HUMAN RIGHTS

NEW YORK STATE: EXECUTIVE DEPARTMENT
DIVISION OF HUMAN RIGHTS

COMPLAINANT	
Anthony J. DeCintio	Case No. 3EO-84-99786E
VS	021-85-0853 3EOR-85-104216E
Westchester County	
RESPONDENT (S)	

DETERMINATION AND ORDER
AFTER INVESTIGATION

On November 9, 1984, and July 13, 1985, Anthony J. DeCintio filed a verified complaint with the State Division of Human Rights, charging the above-named respondent (s) with an unlawful discriminatory practice relating to employment in violation of the Human Rights Law of the State of New York.

After investigation and following a

review of related information and evidence with named parties, the Division of Human Rights has determine in the above-entitled complaint that there is no probable cause to believe that the respondent (s) engaged in the unlawful discriminatory practice complained of.

> This determination is based on the following: The investigation revealed that complainant was suspended and subsequently terminated for failure to act properly during an emergency situation. Complainant was treated in the manner proscribed by the Civil Service Rules and Regulations and a hearing was held. Complainant was found guilty of misconduct and incompetence by the hearing officer and termination was recommended. There is no evidence that Respondent retaliated against Complainant because he had filed charges of discrimination.

The Complaint is, therefore, ordered dismissed and the file is closed.

Any party to this proceeding may appeal this Determination to the New York State Supreme Court in the County wherein

the unlawful discriminatory practice took place by filing directly with such Court a Notice of Petition and Petition within sixty (60) days after service of this Determination. A copy of the Petition and Notice of the Petition must also be served on all parties including the Division of Human Rights. DO NOT FILE THE ORIGINAL PETITION AND NOTICE OF PETITION WITH THE STATE DIVISION OF HUMAN RIGHTS.

PLEASE TAKE FURTHER NOTICE that a complainant who seeks state judicial review, and who receives an adverse decision therein, may lose his or her right to proceed subsequently in federal court under Title VII, by virtue of Kremer vs. Chemical Construction Co., 456 U.S. 461 (1982).

Dated and Mailed: NOV 27 1985

Anthony J. DeCintio STATE DIVISION OF
55 Mamaroneck Road HUMAN RIGHTS

Scarsdale, NY

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